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**OFFICE OF PETITIONS**

In re Patent No. 6,591,529 :  
Issue Date: 07/15/2003 :  
Application Number: 09/676,973 : DECISION ON PETITION  
Filing Date: 09/27/2000 :  
For: SUPPORT STRUCTURE FOR :  
DECORATIVE MOBILE :

This is a decision on the petition under 37 CFR 1.378(b),<sup>1</sup> filed on April 2, 2012, to accept the delayed payment of the maintenance fee for the above-identified patent.

The petition is dismissed.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). Any such petition for reconsideration must be accompanied by the petition fee of \$400.00 as set forth in 37 CFR 1.17(f). The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further

<sup>1</sup> A grantable petition to accept a delayed maintenance fee payment under 37 CFR 1.378(b) must include

- (1) the required maintenance fee set forth in § 1.20(e) through (g);
- (2) the surcharge set forth in § 1.20(I)(1); and
- (3) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

reconsideration or review of the matter will be undertaken by the Director.

The patent issued on July 15, 2003. The first maintenance was timely filed. The second maintenance fee could have been paid during the period from July 15, 2010 through January 18, 2011, or, with a surcharge, during the period from January 19 through July 15, 2011. The patent expired at midnight on July 15, 2011, for failure to timely pay the first maintenance fee.

Petitioner, *pro se*, states, in pertinent part:

During this whole economic downturn my business came to a halt and my husband lost his job. My husband looked for a job for two years before finally landing a job with a company out of Great Britain. I have been a self-employed commercial photographer for many year and the onslaught of digital photography has made matters worse for those of us who used medium format film. The patent that I developed was to be my retirement so it is vitally important to my families lively hood. It was my hope that we would find work or sell our house soon enough so that I would not be late with the maintenance fees but that just wasn't the case and we were finally incapacitated.

With the job losses and the economy in a state of flux, you can imagine life was difficult and we ran out of money. We could not get a loan and family helped as much as they could. Bills kept piling up and we were being threatened from the bank about our home. They said they would help in regards to our mortgage but really they were no help at all. We were told one thing only to have it change as people left form the bank and the relationships with people we trusted were no longer there. I sole most of my equipment just so that we could eat. It is humiliating to have to tell you this and I'm not looking for pity but you need to know the severity of our situation. We couldn't even pay for basic needs. All I could think of was that my patent fees were due but after speaking with the people at the USPTO I never gave up hope. We put our home up for sell during a time that houses were not selling, as many people were in the same dire situation we were. It took us over a year to sell the house and we had to price it to sell or lose it all together. We lived in a state of fear. As difficult it as it was to sell the beautiful

log house we built ourselves and our kids grew up in, we managed to find a buyer just in the nick of time. We came so very close to losing everything we had worked so hard for. I knew that if we lost our home to foreclosure that I would never be able to pay my maintenance fees and I would lose my patent. The stress from all this caused complications with my health and the medical bills are endless.

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable".<sup>2</sup> A patent owner's failure to pay a maintenance fee may be considered to have been "unavoidable" if the patent owner "exercised the due care of a reasonably prudent person."<sup>3</sup> This determination is to be made on a "case-by-case basis, taking all the facts and circumstances into account."<sup>4</sup> Unavoidable delay under 35 U.S.C. § 41(b) is measured by the same standard as that for reviving an abandoned application under 35 U.S.C. § 133.<sup>5</sup> Under 35 U.S.C. § 133, the Director may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable". Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable.<sup>6</sup> However, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay.<sup>7</sup> In view of In re Patent No. 4,409,763,<sup>8</sup> this same standard will be applied to determine whether "unavoidable" delay within the meaning of 37 CFR 1.378(b) occurred.

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the

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<sup>2</sup> 35 U.S.C. § 41(c)(1).

<sup>3</sup> Ray v. Lehman, 55 F.3d 606, 608-09 (Fed.Cir.), cert. denied, -- U.S. ---, 116 S.Ct. 304, L.Ed.2d 209 (1995).

<sup>4</sup> Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

<sup>5</sup> In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (PTO Comm'r 1988).

<sup>6</sup> Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

<sup>7</sup> Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

<sup>8</sup> 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988), aff'd sub nom. Rydeen v. Quigg, 748 937 F.2d 623 (Fed. Cir. 1991) (table), cert. denied, 502 U.S. 1075 (1992).

petitioner has failed to carry his or her burden to establish that the delay was unavoidable.<sup>9</sup> 35 U.S.C. § 133 does not require the Director to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Director that the delay in payment of a maintenance fee is unavoidable.<sup>10</sup>

As 35 USC § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 USC § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.<sup>11</sup> That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken by the responsible party to ensure the timely payment of the second maintenance fee for this patent.<sup>12</sup>

Petitioner has not presented a sufficient showing of unavoidable delay resulting from financial hardship. A complete showing is required of petitioner's, or the party responsible for payment of the maintenance fee's, financial condition including all income, expense, assets, credit, and obligations which made the delay from July 15, 2011, the date the maintenance fee was due, until the filing of a grantable petition, unavoidable. Petitioner must provide verified copies of any available documents or records (e.g., copies of all bank statements and other documents as detailed below) covering the entire period between July 15, 2011, and the filing of a grantable petition, including the maintenance fee payment.

Petitioner may provide this documented showing by supplying copies of mortgage documents showing the monthly mortgage payment as well as the balance due, documentation of other loan payments (i.e., vehicle loans or credit card statements), other expenses (i.e., utilities, food, and clothing), as well as a statement of

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<sup>9</sup> See Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960).

<sup>10</sup> See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991) (table), *cert. denied*, 502 U.S. 1075 (1992); Ray v. Lehman, *supra*.

<sup>11</sup> Ray, 55 F.3d at 609, 34 USPQ2d at 1788.

<sup>12</sup> Id.

all assets owned by petitioners (e.g., petitioners' home(s), vehicles, investments, bank accounts, and personal property).

Any renewed petition must be accompanied by a thoroughly documented showing as listed above.

Likewise, petitioner must explain whether she had sufficient credit available to charge the maintenance fee during the period when it could have been timely paid. Petitioner should also explain whether any other sources of income, such as loans or gifts, were available that could have been used to timely pay the maintenance fee.

In this regard, a showing of diligence in matters before the USPTO is essential to support a finding of unavoidable delay herein.<sup>13</sup> There is no "sliding scale" based upon the priority given to this maintaining this patent in force, or more diligently seeking reinstatement, vis-a-vis other matters by petitioner; the issue is solely whether the maintenance, or reinstatement, of the patent at issue was actually conducted with the care or diligence that is generally used and observed by prudent and careful persons in relation to their most important business. The record fails to adequately evidence that petitioner exercised the due care and diligence observed by prudent and careful persons, in relation to her most important business, which is necessary to establish unavoidable delay.<sup>14</sup>

Lastly, with regard to petitioner's assertion of health complications, a showing of "unavoidable" delay based upon physical incapacitation, should petitioner wish to pursue such a ground of unavoidable delay, must establish that petitioner's incapacitation was of such nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office) during the period between July 15, 2011 and April 2, 2012. Such a showing must be supported by a statement from petitioner's treating physician, and such statement must provide the nature and degree of petitioner's incapacitation during this above-mentioned period.

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<sup>13</sup> See Futures Technology, Ltd. v. Quigg, 684 F. Supp. 430, 431, 7 USPQ2d 1588 (E.D. Va. 1988) (applicant's diligent inquiry into the status of the application is required to show unavoidable delay); Douglas v. Manbeck, 21 USPQ2d 1697, 1699-1700 (E.D. Pa. 1991), *aff'd*, 975 F.2d 869, 24 USPQ2d 1318 (Fed. Cir. 1992) (even representation by counsel does not relieve the applicant from his obligation to exercise diligence before the USPTO; applicant's lack of diligence extending two and one half years overcame and superseded any omissions by his counsel).

<sup>14</sup> Pratt, *supra*.

While the Office is mindful of the difficulties encountered by petitioner as described in the petition, a showing of unavoidable delay requires, nonetheless, that petitioner provide a documented showing that she exercised the level of care of a reasonably prudent person acting with respect to his most important business.

Petitioner is cautioned to avoid submitting personal information in a patent application that may contribute to identity theft. If personal information such as social security numbers, bank account numbers, or credit card numbers are included in documents submitted to the USPTO (other than a check or credit card authorization form PTO-2038 submitted for payment purposes), petitioners should consider redacting such personal information from the documents before submitting them to the USPTO. This type of personal information is never required by the USPTO to support a petition or an application. Petitioner is advised that any information submitted in an application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, information from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

Petitioner should note that if this petition is not renewed, or if renewed and not granted, then the maintenance fee and post-expiration surcharge are refundable. The \$400.00 petition fee for seeking reconsideration is not refundable. Any request for refund should be in writing to the address noted below.

Any renewed petition must be accompanied by evidence supporting a conclusion that the failure to timely pay the maintenance fee was unavoidable.

#### **ALTERNATIVE VENUE**

Petitioner may wish, in the alternative, to request reconsideration in the form of a petition under 37 CFR 1.378(c), requesting that the unintentionally delayed payment of a maintenance fee be accepted. A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. 41(c) and 37 CFR 1.378(c) must be filed within twenty four months from the end of the six month grace period (e.g., the expiration date of the

patent and be accompanied by (1) a verified statement that the delay was unintentional, (2) payment of the appropriate maintenance fee, unless previously submitted, (3) payment of the \$1,640.00 surcharge (the amount of \$700.00 already paid may be credited thereto leaving a balance due of \$940.00) set forth in 37 CFR 1.20(i)(2). The statement can be verified by using the attached petition form which includes a declaration according to 37 CFR 1.68.

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the patent was expired until the filing of the petition to reinstate under 37 CFR 1.378(c), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.378(c).

Further correspondence with respect to this matter should be addressed as follows:

By mail:           Mail Stop Petition  
                  Commissioner for Patents  
                  P.O. Box 1450  
                  Alexandria, VA 22313-1450

By FAX:           (571) 273-8300  
                  Attn: Office of Petitions

By hand:           Customer Service Window  
                  Mail Stop Petition  
                  Randolph Building  
                  401 Dulany Street  
                  Alexandria, VA 22314

Telephone inquiries should be directed to the undersigned at 571-272-3231.



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Encl:           Form PTO/SB/66